

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7022 OF 2005

Ashokkumar Sureshkumar Mehta .. Petitioner

Versus

Kothari Sales Corporation & Ors... Respondents

Mr.J.B.Kocheta for petitioner

Mr.N.N.Vaishnava for respondents.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 31st January 2006.

P.C.

. Rule, returnable forthwith. Heard
parties.

2. By the present petition, the order passed in review application dated 16th May 2005 is under challenge. The suit which has been preferred by respondent is a summary suit and it is the case of the plaintiff that after service of summons for judgement leave to defend was not applied within the prescribed time of 10 days as contemplated under Order 37 of C.P.C. There is a delay in filing the application for leave to defend. However, in the impugned order the trial court has given a finding that the service of the summons is not in accordance with the procedure prescribed in Civil Procedure Code. If it is so then in my opinion the period of 10 days shall not commence to run. Trial court has given a finding that by virtue of filing leave to defend petitioner defendant has given a go by to the said objection of not being served by the prescribed procedure.

3. In my opinion, if it is so the court

below could not have passed a decree on the ground of delay in seeking leave and refuse to condone the same.

4. In the light of the aforesaid, order dated 16th May 2005 is quashed and set aside. Revision application granted in terms of prayer clause (a) only. The matter is remanded back to the learned Civil Judge, Senior Division, Nashik at Malegaon to decide on merits whether petitioner defendant is entitled to leave and if so on what condition.

5. Both the parties agree that the defence raised in the written statement filed by the defendant can be considered in support of contention that leave should be granted to the petitioner or not. However, the said written statement should be taken on record only after leave is granted by that court, conditional or unconditional and if leave is refused, written

statement will not be taken on record. The ground set out in written statement on merits will be allowed to be urged in support of application for leave to defend in the present case. Respondents will be at liberty to file rejoinder if he is so advised. Petition disposed of accordingly. Trial court to dispose of the summons for judgement within four weeks from today. No order as to costs.

(S.C.DHARMADHIKARI, J)